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Nos. ~~1256~~ and ~~1257~~

In the Supreme Court of the United States

OCTOBER TERM, 1946

WESLEY WILLIAM COX, PETITIONER

v.

UNITED STATES OF AMERICA

THEODORE ROMAINE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1256

WESLEY WILLIAM COX, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1257

THEODORE ROMAINE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

These are companion cases to *Roisum* v. *United States,* No. 1258, this Term. All three cases involve members of the Jehovah's Witnesses sect who were convicted for deserting from Civilian Public Service Camps to which they reported. Their convictions were affirmed in one joint

opinion by the Circuit Court of Appeals for the Ninth Circuit.

No. 1256—*Cox*. Petitioner's selective service file shows that he registered under the Selective Training and Service Act on October 16, 1940, with local Board No. 2, Jackson County, Oregon (R. 8). He filed his questionnaire (Pl. Ex. No. 2, R. 9) on December 3, 1940. He stated that he was 22 years old; that since 1936 he had been employed as a truck driver hauling lumber; and that he was engaged in no other business or work. He did not claim exemption from service as a minister or as a conscientious objector.

On December 4, 1940, the local board classified petitioner in Class I, subject to physical examination, and on January 31, 1941, he was classified IV–F—not physically fit for service. The classification was changed to I–A on March 10, 1942. Ten days later, on March 20, 1942, petitioner for the first time claimed exemption from military service. He filed the form provided for registrants asserting conscientious objections to military service (Pl. Ex. No. 3, R. 9).

In this document petitioner stated that he joined the Jehovah's Witnesses sect in January 1942 and began witnessing from house to house and on street corners; that his occupation was "logging and lumbering"; and that his minister was one Elmer Halbert, the leader of the local unit of Jehovah's Witnesses.

The local board rejected petitioner's claim to exemption, but on May 25, 1942, he was again classified in IV–F, as one physically unfit for military service. On June 12, 1942, the local board reclassified petitioner in IV–E, as a conscientious objector to military service. In response to this classification, petitioner wrote the local board on June 22, 1942, requesting for the first time that he be classified as a minister of religion (R. 12). On June 26, 1942, the local board determined that petitioner was properly classified IV-E. On the same date petitioner took an appeal to his board of appeal and on December 7, 1942, the board of appeal also classified him in IV–E.

Petitioner informed the board that on October 16, 1942, he became a "pioneer" in the sect and undertook to devote 150 hours monthly to religious work. An affidavit from his minister was filed stating that petitioner had been in the sect since January 1942 and that he was serving as a minister. He also filed a statement from the Watchtower Bible and Tract Society to the same effect. (R. 12–15.)

Petitioner requested the local board to reconsider the classification, but on December 21, 1942, the board refused to do so. On May 18, 1944, the local board ordered petitioner to report for work of national importance. He reported (R. 10) to the Civilian Public Service Camp to which he

was assigned "solely for the purpose of completing the administrative process" (R. 18) and he then left the camp (R. 22).

Thereafter on October 17, 1944, petitioner was indicted (R. 2–3) in the United States District Court for the District of Idaho for having deserted from the camp, in violation of Section 11 of the Selective Training and Service Act. At his trial, the Government's evidence established that petitioner was finally classified IV–E, and that he reported to the Civilian Public Service Camp to which he was assigned and then left the camp without permission (R. 8–10, 15–17). The contents of petitioner's selective service file was received in evidence as exhibits. For his defense petitioner testified as to the events before the draft board (R. 20–22) and he testified *de novo* as to his duties as a minister (R. 21). His wife testified that petitioner was recognized by the sect as a minister, but the testimony was stricken from the record on motion of the Government (R. 23). Petitioner adduced no other evidence.

Over petitioner's objection the court instructed the jury not to concern itself with the action of the selective service boards (R. 27–28). Petitioner was convicted (R. 4) and sentenced to imprisonment for a term of three years and three months and to pay a fine of $300 (R. 4–5). Upon appeal to the Circuit Court of Appeals

for the Ninth Circuit, the judgment was affirmed (R. 56–61, 62).

No. 1257—*Thompson.* On October 16, 1940, petitioner registered with Local Board No. 1, Jackson County, Oregon (Pl. Ex. No. 1, R. 9). In his selective service questionnaire (Pl. Ex. No. 2, R. 10) which was executed May 27, 1941, petitioner stated that his occupation was that of operating a grocery store and that, in addition, he had been a minister in the Jehovah's Witnesses sect since August 1, 1940. In the conscientious objector's form (Pl. Ex. No. 3, R. 10) which he filed at the same time, petitioner stated that he became a member of the sect in August 1940; that after completing high school in 1928 he worked as a grocery clerk and manager until 1935, as an embalmer in 1935, and as a grocery manager and owner thereafter; and that one Fred Kimmet, the local leader of the Jehovah's Witnesses, was his minister of religion.

On May 28, 1941, the local board classified petitioner in III–A, a deferred classification because of dependents. When the dependency deferment was no longer available to persons in petitioner's situation he was classified IV–E, as a conscientious objector to military service.

On November 5, 1943, petitioner took an appeal to his board of appeal and he adduced additional evidence in support of his claim to exemption. He filed a statement signed by various members

of the sect stating that they recognized him as a minister, and an affidavit by Kimmet, the local leader, stating that petitioner's record of "field service" for the year ending September 30, 1943, showed that petitioner devoted 519½ hours in which he disposed of 46 bound books, 625 booklets and 673 magazines, and during which he made 105 "back calls" and 316 "sound attendance." Similar supporting documents corroborating petitioner's claim were also filed (see R. 14–17).

On December 29, 1943, the board of appeal by vote of 5 to 0 classified petitioner in IV–E. An order to report for work of national importance was sent to petitioner (Pl. Ex. No. 5, R. 11) and he complied with it by reporting to the Civilian Public Service Camp to which he was assigned. After reporting to the camp, petitioner promptly handed to the camp director a letter stating that he believed himself to be wrongly classified and that he would not remain at the camp (R. 21–22). Within fifteen or twenty minutes after reporting petitioner left the camp and did not return (R. 27).

On October 17, 1944, petitioner was indicted (R. 2–3) in the United States District Court for the District of Idaho in one count charging that he departed from the camp without authority, in violation of Section 11 of the Selective Training and Service Act. His trial followed the same pattern as the trial in the *Cox* case, *supra*. The

Government's proof established that petitioner was finally classified IV–E, that he reported to the camp in compliance with the board's order and that he then left the camp without authority (R. 8–11, 18–20). The pertinent contents of petitioner's selective service file were admitted in evidence (see R. 9, 10, 11, 14, 16).

For his defense, petitioner testified briefly concerning his claim to exemption as a minister (R. 24–27). On the Government's objection, he was not permitted to testify *de novo* concerning his asserted duties as a minister (R. 25). The only other defense witness was a member of the sect who testified that she recognized petitioner as a minister (R. 28).

As in the *Cox* case, the court instructed the jury that it should not concern itself with the selective service classification (R. 32) and the jury thereafter returned a verdict of guilty (R. 4). Petitioner was sentenced to imprisonment for a term of three years and three months and to pay a fine of $300 (R. 4–5). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed (R. 60–65).

ARGUMENT

There are two aspects to petitioners' argument: (1) The court erroneously excluded *de novo* evidence proffered for the purpose of showing that petitioners were in fact ministers of religion. (2) The court erroneously instructed the jury in

each case that the selective service classification was final and not open to reexamination by the jury.

1. *Estep* v. *United States,* 327 U. S. 114, settled beyond question the fact that a criminal court may not inquire *de novo* into the defendant's claim to exemption from military service. Instead, the administrative determination is final and is subject to judicial inquiry only on jurisdictional grounds. Unless the defendant can establish that there is no factual basis in the administrative record for the classification or that in reaching its decision the board departed in a substantial respect from the selective service regulations, the classification is invulnerable. See *Eagles* v. *United States ex rel. Samuels,* 329 U. S. 304, 311–312, 316–317. In both cases here the excluded evidence consisted of proffered testimony as to petitioners' religious activities, evidence which was outside the administrative record in each case. Such evidence was not material to the issue whether there is basis in fact in the administrative record for the refusal of the boards to classify petitioners as ministers of religion, and it thus was properly excluded. See *Smith* v. *United States,* 157 F. 2d 176, 183–184 (C. C. A. 4), certiorari denied November 12, 1946, No. 534, this Term.

2. The decision in *Gibson* v. *United States,* 329 U. S. 338, demonstrates that petitioners were entitled to defend on the ground that the selec-

tive service boards exceeded their jurisdiction in refusing to classify them as ministers of religion. Petitioners did not claim in the trial court that they were denied any procedural rights by the boards. The sole question was whether there is basis in fact for the refusal of the boards to classify them as ministers. In each case the pertinent contents of petitioners' selective service files were received in evidence. The question is whether the court erred in instructing the jury that the classification was final.

In our view, the question whether there is some evidence to support the administrative determination is a pure question of law which called for a determination by the trial judge after examining the evidence in the selective service files. It is not an issue of fact for the jury. See *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109–110; and see *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, where the record before this Court shows that the question whether there was evidence to support the administrative determination was decided by the trial judge and the jury was instructed that the order was lawful (No. 91, October Term, 1909). The difficulty in the present cases is that the trial judge did not pass on the question. Hence, there concededly was error in the trial court. We submit, however, that in the particular circumstances of these cases the error was harmless. See *Kotteakos* v. *United States*, 328 U. S. 750.

As we have pointed out, the trial court in each case received in evidence the pertinent contents of the defendant's selective service file. These exhibits were before the circuit court of appeals and after examining them the court determined that there was substantial evidence to support the classifications. The exhibits are now before this Court. We think that they plainly demonstrate that there is ample evidence to support the refusal of the boards to classify petitioners as ministers.

Since the question is simply whether there is any evidence to support the boards' classifications, there are no issues of credibility or weight to be given to various items of evidence (see *Estep* v. *United States*, 327 U. S. 114, 122), upon which the trial court should pass first.[1] The question in these cases is whether viewing the evidence in the light most favorable to the Government there is any basis in fact for the classifications. The circuit court of appeals exercised its judgment on the question and has thus rendered harmless the circumstance that the trial judge did not do so first. Indeed, if petitioners

[1] Questions of credibility and the weight to be given to the various items of evidence in the selective service files are questions for decision only by the selective service boards as the trier of facts. See *Warehouse Co.* v. *United States*, 283 U. S. 501, 508; *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105; *Medo Corp.* v. *Labor Board*, 321 U. S. 678, 681–682; *United States ex rel. Phillips* v. *Downer*, 135 F. 2d 521, 525 (C. C. A. 2).

were to have a new trial or resort to habeas corpus to raise the question, the district court would be called upon to decide a question of law which already has been decided by the circuit court of appeals in the same cases and on the basis of the same selective service files upon which the district court would have to base its decision.

That the facts in the selective service files abundantly support the decision below that the local boards acted on the basis of evidence in refusing to classify petitioners as ministers is plain. On the facts before the local board it would have been less than difficult for the board to conclude that petitioner Cox's claim was asserted solely for the purpose of seeking a refuge from the draft. His evidence showed that his occupation is that of a truck driver and that he asserted a claim to exemption as a minister for the first time shortly after he was classified I–A in 1942, when the war was flagrant, and approximately a year and a half after he had registered for the draft. His claim is that he immediately became a minister in January 1942 when he joined the sect, and that by witnessing from house to house he was performing the functions of a minister. In our view, there is serious doubt concerning his bona fides which the board was entitled to resolve against him. In addition, he did not enjoy the status of a leader in the sect and his functions were no different from those

performed by any other members of the sect. Cox was a truck driver by occupation and at best a Jehovah's Witness by faith.

Similarly, petitioner Thompson's local board had before it evidence that for the thirteen years immediately preceding the draft Thompson was engaged in working in or operating a grocery store, except for a brief tour of duty in 1935 as an embalmer. He continued in this occupation during the war. He claimed he joined the sect in 1940, and the sect's records showed that he averaged about ten hours weekly in religious work during the period from October 1, 1942, through September 30, 1943, mostly in distributing books and magazines. Neither by training nor function was Thompson in any different status than the other members of the sect. He was not the shepherd; he was simply one member of the flock.

CONCLUSION

While a trial must be conducted in conformity with established principles of law—even if they are established after the trial has been completed—these are cases where the failure of the trial court to forecast the *Estep* and *Gibson* decisions did not in any sense prejudice petitioners. Their selective service files were received in evidence and the court below found that they contained substantial evidence in support of the classifications. As we have shown above, an independent examination of the files compels the

same conclusion. Since the files do not reasonably permit the conclusion that there was no evidence before the boards to support their refusal to classify petitioners as ministers and since there was no claim or proof of procedural irregularities in the administrative processes, we respectfully submit that the error of the trial court was harmless in each instance and that the petitions for writs of certiorari should therefore be denied.

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